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In the Supreme Court

(30)
OF THE
United States

OCTOBER TERM, 1943

No. 1029 23

UNION PACIFIC RAILROAD COMPANY

(a corporation),

Petitioner,

vs.

ANNABELLE C. UTTERBACK, WILLIAM R.
UTTERBACK, MARJORIE E. UTTERBACK, and
FRANK S. SEVER, guardian ad litem for
said William R. Utterback and Marjorie
E. Utterback,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court
of the State of Oregon.

BRIEF OF RESPONDENTS IN OPPOSITION.

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OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Oregon is reported in 146 Pac. (2d) 76 (not yet officially reported). It also appears in the record at page 38. The opinion of the Supreme Court of the

State of Oregon on denial of a rehearing is reported in 146 Pac. (2d) 769 (not yet officially reported). It also appears in the record at page 57.

JURISDICTION.

The opinion of the Supreme Court of the State of Oregon was rendered February 8, 1944. A petition for rehearing was denied by the Supreme Court of Oregon on March 14, 1944. Petition for writ of certiorari was filed on May 23, 1944 and served on respondents on June 2, 1944. Jurisdiction, if present, must come from Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, but is not present because of the absence of any substantial Federal question.

The case does not arise under the Federal Employers' Liability Act (35 Stat. 65; 36 Stat. 291; 36 Stat. 1167; 53 Stat. 1504; 45 U.S.C.A., Sections 51-59), or under Section 6 (8) of the Interstate Commerce Act (39 Stat. 604; 49 U.S.C.A., Section 6 (8)), or under any other Federal statute. No right granted petitioner under the Constitution of the United States is here at issue.

ARGUMENT.

GROUND'S FOR CERTIORARI ARE NOT PRESENT.

Petitioner sought to obtain an injunction in the State Court of Oregon restraining respondents, residents of Oregon, from prosecuting in the Courts of

California an action at law against petitioner to recover damages for the death of their husband and father under the Federal Employers' Liability Act (45 U.S.C.A. 51 et seq.). Utterback was killed in Oregon as a result of a collision. The action in California was instituted five months prior to the filing of the petition in Oregon, by an administratrix properly appointed in California. (See *Estate of Waits*, 146 Pac. (2d) 5, 23 A.C. 693.) It was at issue and ready for trial four months prior to the filing of the petition in Oregon. The subsequent proceeding in Oregon was directed against the widow and children of the decedent who had no right of action under the Federal statute and was not directed against the personal representative of the decedent who had the sole right of action under the Federal statute. Upon the appointment of the personal representative in California she came under the control of the California Court in probate and not under the control of the widow. The California proceeding resulted in a judgment in favor of plaintiff in that action. (See *Leet v. Union Pacific R. Co.*, 144 Pac. (2d) 64, 61 A.C.A. 836, 62 A.C.A. 155.) Any contention of interference with the war effort is now moot.

The petition below alleged as claimed grounds for injunctive relief hardship upon the petitioner (R. 4 et seq.) and interference with the war effort (R. 11 et seq.) in that proper presentation of a defense in California would require petitioner to transport a number of its Oregon employees to California. The petition does not claim that the evidence of petitioner's witnesses could not be presented in deposition

form under the laws of the State of California but claims only that "usually such explanations cannot be made adequately or understandably by witnesses testifying by deposition only". (R. 5.) The doctrine of *res ipsa loquitur* applied to the accident in question and at the trial in California evidence was presented in the form of depositions. (*Leet v. Union Pacific R. Co.*, 144 Pac. (2d) 64.) In the last analysis, the sole claim of petitioner for injunctive relief is a claimed hardship worked upon petitioner and not an interference with interstate commerce or the war effort. The testimony of all of the witnesses petitioner desired to call could have been produced in California by deposition.

This Court held in *Miles, et al. v. Illinois Central R. Co.*, 315 U.S. 698, that a State Court cannot validly exercise its local chancery jurisdiction to enjoin a resident of the State from prosecuting a cause of action arising under the Federal Employers' Liability Act on the ground that the prosecution in the Court of the sister State is inequitable, vexatious and harassing to the carrier.

During Federal control of railroads in the last world war, the Director General of such railroads as were under Federal control ordered that all suits against carriers while under Federal control must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the County or District where the cause of action arose. (See *Alabama & Vicksburg R. Co. v. Journey*, 257 U.S. 111.) At the time of the com-

mencement of the California suit petitioner Union Pacific was not under Federal control.

The Oregon Supreme Court held that the exigencies of the war effort absent any legislative or executive fiat do not require it to enjoin the further prosecution of litigation based upon the Federal Employers' Liability Act and pending in the State Court of California, a State in which it is conceded petitioner does business and operates a portion of its railroad system. (R. 39.) In so holding, the Court did not construe Section 6 (8) of the Interstate Commerce Act or make any determination whatsoever with respect to the duties of the President and the Secretary of War under 10 U.S.C.A., Section 1361. The Oregon Court determined only that no reason appeared why the decision of this Court in *Miles v. Illinois Central R. Co.*, 315 U.S. 698, following *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, should not be followed.

The contentions in the petition were urged by petitioner upon the California Court by motion to abate and motion for continuance, were considered by that Court, and denied. The California Court was the proper Court to dispose of these contentions. In view of the fact that the California case has been tried, all such issues are moot in the Oregon litigation.

No Federal right, substantial or otherwise, was denied to petitioner. No question of substance not theretofore determined by this Court was involved and the decision of the Oregon Court was strictly in accord with applicable decisions of this Court.

It is respectfully submitted that the petition for certiorari is entirely devoid of merit and should be denied.

Dated, San Francisco, California,
July 7, 1944.

GEORGE M. NAUS,
Attorney for Respondents.

CLIFTON HILDEBRAND,
LOUIS H. BROWNSTONE,
Of Counsel.